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In The

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

BENJAMIN QUARLES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the New York Court of Appeals correctly found that the

defendant-respondent was entitled to pre-interrogation warnings under Miranda v Arizona after he had been arrested and handcuffed and before being asked "Where is the gun?", where the arresting officers had no concern for their safety and there appeared no other exigent circumstances on the record?.

2. Whether the New York Court of Appeals correctly found that the weapon seized solely as a result of defendant's statement obtained in violation of his rights under Miranda v Arizona should be suppressed.

3. Whether the petitioner may argue that the gun would have been "inevitably discovered" when, under New York law, it failed to preserve the issue in the trial court.

STATEMENT OF CASE

The questions presented in this case arise out of the custodial interrogation of the defendant-respondent on September 11, 1980. The following facts were

adduced from the uncontroverted testimony of the arresting officer at the suppression hearing:

At 12:30 a.m. on the 11th of September, 1980, the officer and his partner were on radio patrol when they were approached by the complainant, who they had not seen before (TR:13)*. The complainant told the officers that she had been raped (TR:3). She described the perpetrator, said that he had a gun and that he was in a nearby supermarket (TR:4).

Putting the complainant in the patrol car, the officers drove to the store and informed the precinct that they were in search of an armed perpetrator at that location

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*All references in the statement of facts are to the original transcript.

(TR:14). At least two patrol cars came to their assistance and there were at least six officers on the scene before the arresting officer entered the store (TR:15).

The officer testified that he, at first, observed only the clerk and then saw the defendant as he walked up one of the store's center aisles (TR:15-16).

The defendant then turned and ran back up the aisle toward the rear of the store (TR:19). The officers immediately gave chase (id).

The defendant, at the end of the aisle, somewhat less than thirty feet anead of the officer, turned the corner and was out of his view for a brief period of time (TR:21). When the arresting officer turned that corner he again had the defendant in view and "told him to stop, put his hands over his head." (TR:23).

At that point, at least four officers converged on the scene, surrounding the defendant (id). At least two of them had their weapons drawn (TR:24).

The defendant stood still, hands raised, surrounded by police with drawn weapons. The arresting officer "moved right next to the defendant", holstered his revolver, and frisked him, without saying a word (id).

On conducting a thorough frisk of the defendant, the officer discovered an empty shoulder holster, and nothing more (TR:25). After the frisk was completed, the defendant's hands were cuffed behind his back.

At the point that the defendant was handcuffed, none of the officers had their weapons drawn. According to the arresting officer, they had the situation "definitely" under control (TR:28).

Speaking for the first time since he had ordered the defendant to halt, the officer "then asked the defendant where the gun was" (TR:27). Looking in the direction of a stack of cartons the defendant replied "the gun is over there" (TR:28). The officer went over to the stack, reached his hand into the carton indicated and

"found a gun" (id).

The officer said to the defendant "You're under arrest". He then read him the Miranda warnings from a pre-printed paper (TR:29). As to each of the four warnings the defendant was asked whether he understood. The defendant replied he did understand as to both the right to remain silent and the right to have counsel present. The defendant merely shook his head (yes) in response to whether or not he understood that his statements might be used against him, and made no response at all to the question as to whether or not he understood the right to have an attorney provided if he could not afford one (TR:9).

When asked whether or not he understood that if he had an attorney available he could remain silent until able to consult with him the defendant gave "no answer, no remarks whatever", but he answered "yes" to the question "are you willing to answer any questions without an attorney

present?" (id).

The officer then asked the defendant whether he owned the gun, and the defendant said he did. To the officer's question of where the gun was bought, the defendant responded "Miami, Florida". No further questioning occurred beyond that necessary for the defendant's booking (TR:11).

ARGUMENT

POINT I

THE NEW YORK COURT OF APPEALS CORRECTLY DETERMINED THAT THE GUN AND STATEMENTS OBTAINED AS A RESULT OF CUSTODIAL INTERROGATION OF THE RESPONDENT PRIOR TO HIS RECEIPT OF MIRANDA WARNINGS WERE PROPERLY SUPPRESSED

The New York Court of Appeals determined that Respondent was entitled to pre-interrogation Miranda warnings once he had been placed under

arrest and had been frisked and handcuffed and before police questioning as to the location of a weapon. While the People argue that exigent circumstances can justify the police in asking for the location of a weapon even after a prisoner is in custody but before providing Miranda warnings, neither the record nor any relevant case law supports the application of any such exception in this case.

The record of the suppression hearing reveals that the police officers were not concerned with their safety when they interrogated the respondent as to the location of a weapon. The arresting officer testified that the situation was "definitely" under control and that all the other officers on the scene had holstered their weapons at the time of the interrogation. No other person was said to be in the immediate vicinity nor was there any claim that respondent had any confederate nearby.

The trial court specifically found that safety was not a factor at the time that respondent was asked about the weapon (A:4a *. The Appellate Division affirmed the findings of the trial court without modifying the facts found by the lower court. The Court of Appeals consistent with the findings of fact, held that:

> There is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern. Nor so far as appears from the record, was any such theory advanced by the People at the suppression hearing. Undeniably, neither of the courts below, with fact finding jurisdiction, made any factual determination that the police acted in the interest of public safety. at (A:7a).

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* All "A" references are to the appendix filed with the petition for a writ of certiorari.

Under the record presented to this Court, it is therefore clear that the question asked of respondent before he was read his rights was "custodial interrogation" as defined by this Court in Miranda and Rhode Island v Innis, 446 U.S.291 (1981). Such interrogation should have been preceded by the Miranda warning.

Petitioner argues that it is necessary for this Court to establish an exception to the Miranda rule where exigent circumstances are presented. Numerous courts, including the New York Court of Appeals, have recognized that where the situation is not in control, and poses a threat to the safety of the officers, the officers need not immediately proffer the Miranda warnings before taking the steps necessary to secure the situation. Thus, in People v Chestnut, 51 NY2d 14 (1980), cert. den. 499 U.S. 1018 (1981), the Court of Appeals permitted the question "Where is the gun?" when the record

demonstrated that there was a substantial basis for the officers to be concerned for their welfare and safety and, as the court noted in distinguishing the instant case, "the situation was not yet under control (A:8a)". The Chestnut decision is in accord with similar cases from other jurisdictions and Federal courts as cited on page 9 of the petition. See also, U.S. v Castellana, 500 F.2d 325 (5th Circ. 1974) and U.S. v Ganter, 436 F.2d 364 (7th Circ. 1970).

The suppression of the statements and the gun in this case has been upheld by the New York courts not, as petitioner contends, because of an inadequate rule of law, but because the record herein does not establish the existence of any "exigent circumstances", in the form of a threat to the safety of the officers' or the public, or otherwise.

The petitioner's argument that certiorari should be granted so that this court can decide whether "exigent

circumstances" can justify the police in asking a question of a person in their custody without providing Miranda warnings" is unavailing in the absence of any such circumstances.

POINT II

THE GUN WAS PROPERLY SUPPRESSED AS "TAINTED FRUIT"

The gun which was seized in this case was obtained solely as a result of the confession obtained from respondent in violation of his rights under Miranda. Under such circumstances, the Court of Appeals correctly held that the gun should be suppressed. Wong Sun v U.S., 371 U.S. 471 (1963).

The theory of Michigan v Tucker, 417 U.S. 433 (1974), upon which the petitioner relies, is inapplicable to the case at bar. In Tucker, the Court found that police interrogation, which took place prior to the Court's

decision in Miranda was correct under the then existing standard established in Escobedo v Illinois, 378 U.S.478 (1964). The Court then found that the violation involved had been merely technical, and that the police had, in fact, complied with the constitutional safeguards then required (See Tucker at pp. 446-448).

In the instant case, however, no warnings were given respondent until after he had been asked the question, given his answer and the gun located. This was not merely a failure to provide respondent with the exact formulation required under Miranda. Rather it was a total failure to accord respondent any warnings prior to an undeniably custodial interrogation. Under such circumstances, the exclusionary rule applies to both the confession and the fruits derived therefrom. See U.S. v Downing, 665 F.2d 404 (First Cir. 1981).

As respondent argues and the New York courts have held, respondent was enitled to have been advised of his rights under Miranda prior to being asked the question "Where is the gun?" The gun which was obtained in violation of such constituional rights must be suppressed. Michigan v Tucker does not mandate a different result.

POINT III

THE PETITIONER HAS NOT PRESERVED THE ISSUE OF "INEVITABLE DISCOVERY" FOR APPEAL

The petitioner argues in this court that the gun should not have been suppressed since it would have "inevitably" been discovered even absent the respondent's statement. However, this issue was not preserved below.

The People never advanced any such argument in the trial court and, under the well-established law of the State of New York, the issue was not

preserved for appeal. See People v Tutt, 38 N.Y.2d 1011 (1976); People v Martin. 50 N.Y.2d 1029 (1980). The contention as to inevitable discovery was raised for the first time in the Appellate Division, which affirmed the original decision without opinion. When the issue was raised in the Court of Appeals it was ignored by both the majority and dissent.

Having failed to raise the issue in the appropriate court, it is submitted that the issue cannot be raised at this time for this court.

CONCLUSION

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted

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On the Brief